

Internal Revenue Service
memorandum

CC:TL:Br3
DAMustone

date: JUL 5 1988

to: District Counsel, Cincinnati C:CIN
Attn: Robin L. Herrell

from: Acting Director, Tax Litigation Division CC:TL

subject: Technical Advice - [REDACTED]
et al., Docket Nos. [REDACTED] & [REDACTED]

By memorandum, dated December 9, 1987, it was requested that we provide technical assistance with respect to the above litigation. The issues involved were discussed at length with Robin Herrell of your office on December 17, 1987. The following more fully sets forth our views on those issues.

ISSUES

(1) Whether stock distributed to a taxpayer from a pension plan presumably qualified under IRC § 401(a) which was deposited in an Individual Retirement Account (IRA) after the 60-day deadline for rollovers can constitute an excess contribution within the meaning of IRC § 4973; (2) whether an untimely rollover of stock invalidates an IRA.

CONCLUSION

It is our conclusion that untimely rollovers are to be included in determining whether there has been excess contributions under § 4973. At the same time, the untimely rollover of non-cash items, such as stock, will not invalidate an IRA.

DISCUSSION

In [REDACTED] and [REDACTED] common stock was distributed to [REDACTED] from various qualified plans in which he was participant. The stock was admittedly deposited in an IRA more than 60 days after receipt of the distributions. In an effort to avoid the excise tax imposed under § 4973,

008400

petitioners contend that the IRA failed to comply with IRC § 408(a)(1) (as a result of the untimely rollover of stock) and therefore, was invalid from its inception.

With respect to the first issue, § 4973 makes clear that amounts distributed from a qualified plan which do not meet the requirements for rollover are included in the excess contribution computation. See § 4973(b)(1)(A). The applicable requirements for rollover here are found in IRC § 402(a)(5), which requires, inter alia, that the transfer to an IRA occur no later than 60 days following the day on which the distribution was received. See § 402(a)(5)(C). Since that did not occur here, the attempted rollover is to be included in determining whether there has been an excess contribution for purposes of § 4973. 1/

Turning to the second issue, § 408(a)(1) requires only that the written IRA instrument provide, inter alia, that non-cash contributions (other than timely rollovers) will not be accepted. See Treas. Reg. § 1.408-2(b)(1). Thus, the focus of § 408(a)(1) is plainly on the form of the IRA. And presumably, the IRA document here contained the requisite language. Accordingly, as the regulations provided, the sanction for accepting and retaining excess contributions is the § 4973 excise tax, and not disqualification. See Treas. Reg. § 1.408-1(c)(1).

Lastly, to the extent that the taxpayer may argue that the result in this case is harsh or unfair, the Tax Court has (in the context of the active participant limitations for IRA contributions) made clear that it cannot ignore the plain language of the IRA provisions to achieve what would appear to be the equitable result. See, e.g., Eanes v. Commissioner, 85 T.C. 168, 171-72 (1985). This assessment would appear to be equally applicable to the failure to make a timely rollover as occurred here.

1/ Moreover, it should be noted that because the rollover here was in stock, the entire amount (and not just that in excess of the applicable IRA contribution limit) is to be treated as an excess contribution. Compare § 4973(b)(1)(B) with IRC § 219(e)(1)(A) (only contributions paid in cash constitute qualified retirement contributions for purposes of § 219(a)).

If we can be of any further assistance, please contact David
Mustone of this Division at FTS 566-3407

PATRICK J. DOWLING

By:

A handwritten signature in dark ink, appearing to read "Daniel J. Wiles", is written over a horizontal line.

DANIEL J. WILES
Chief, Branch No. 3
Tax Litigation Division